

STATE OF NORTH DAKOTA
GAME AND FISH DEPARTMENT

IN THE MATTER OF:

David B. Gray

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**RECOMMENDED
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

OAH File No. 20040383

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This is an administrative matter before the North Dakota Game and Fish Department (“Department”) under the provisions of N.D.C.C. chapter 20.1-16, the Interstate Wildlife Violator Compact (“Compact”). It involves the suspension of the North Dakota hunting, trapping, and fishing privileges of David B. Gray (“Gray”).

On October 21, 2004, the Department requested the designation of an administrative law judge (“ALJ”) from the Office of Administrative Hearings to preside as hearing officer at a hearing under N.D.C.C. ch. 20.1-16. On October 22, 2004, ALJ Allen Hoberg was designated to preside. On October 25, 2004, the hearing officer held a telephone prehearing conference. It was attended by the hearing officer, Gray, who was representing himself, and Dean J. Haas, assistant attorney general, who represented the Department. At the prehearing conference were discussed some evidentiary concerns and the scheduling of the hearing. The parties agreed that the hearing would be held on October 27, 2004.

On October 25, 2004, the hearing officer issued a Notice of Hearing and Specification of Issues. The notice officially scheduled an October 27, 2004, hearing, at the Office of Administrative Hearings, Bismarck. It specified the issues as those listed in N.D.C.C. 20.1-16-05(3)(a).

The hearing was held as scheduled. Gray was present and represented himself. The Department was represented by Mr. Haas. The Department called one witness, Chief Game Warden Robert G. Timian, the North Dakota Compact Administrator (“Administrator”), and offered six exhibits, all of which were admitted. *See* attached exhibit list. Gray testified in his own behalf and offered two exhibits, both of which were admitted. *See* attached exhibit list. Mr. Gray also offered numerous other documents of which the ALJ took notice as part of Gray’s argument in this matter. He did not mark them as exhibits and they are not intended to be part of the record of the facts in this matter. In fact, Gray’s testimony was mostly a presentation of his legal argument in this matter and one of his two exhibits admitted (exhibit 8) was really documentation supporting his legal argument. After the hearing, the hearing officer took official notice of a document, exhibit 9, which was discussed at the hearing, but not offered; it should be a part of the procedural history of this matter. *See* attached exhibit list. At the close of the hearing, Mr. Gray and Mr. Haas gave oral closing argument.

Based on the evidence presented at the hearing and the oral argument of the parties, the hearing officer makes the following recommended findings of fact and conclusions of law.

FINDINGS OF FACT

1. North Dakota is a member of the Compact and has been since August 15, 2001. *See* N.D.C.C. ch. 20.1-16. Wyoming is also a member of the Compact.
2. In September 2004, the Administrator received from Utah law enforcement, the host of the data base for Compact members, online information regarding a Wyoming conviction of Gray for violation of the Wyoming “Trespass to Hunt laws. W.S. section 23-3-305(b). *See* exhibit 1.

3. The Administrator reviewed North Dakota law to see if North Dakota had a similar law and contacted Wyoming to obtain additional information. He received exhibit 1 and part of the information of exhibit 3 from the corresponding agency in Wyoming.

4. On September 21, 2004, the Department sent a letter to Gray suspending all of his North Dakota hunting, fishing, and trapping licenses under N.D.C.C. § 20.1-16-03. Exhibit 9.

5. Subsequently, Gray came in to visit with the Administrator and the Administrator agreed that the Department would hold off enforcement of the September 21, 2004, letter until it obtained further information from Wyoming.

6. The Administrator then received a copy of exhibit 2 and part of exhibit 3 (map and some other information) from Wyoming and, then, on October 12, 2004, issued a letter to Gray in the Administrator's office, suspending all of Gray's North Dakota hunting, fishing, and trapping licenses. Exhibit 4.

7. On October 19, 2004, Gray filed a letter appealing the October 12 suspension and asking for a hearing. Exhibit 5. Exhibit 6 is the Department's request for the designation of a hearing officer to conduct a hearing.

8. The evidence shows, by the greater weight of the evidence (see exhibits 1-3), that Gray was convicted of a crime, Trespass to Hunt, in violation of W.S. section 23-3-305(b) on April 19, 2004. This crime was committed while Gary was hunting wildlife on private land in Wyoming. W.S. section 23-3-305(b) requires only that the person enter upon the private property of another person to hunt, fish, or trap without the permission of the owner or person in charge of the property. It is not the exact same law as North Dakota's N.D.C.C. section 20.1-01-18 which forbids trespass for hunting purposes upon legally posted land belonging to another without first obtaining permission. However, it is clear from the decision of the Wyoming

Circuit Court and the Wyoming District Court, on appeal, and the documentation of the citing Wyoming officer, that the Wyoming private land was posted with signs, “No Trespassing” and “No Hunting” and Gray did not have permission to hunt on the land. Exhibits 1-3.

9. Gray pled not guilty to the criminal charge in Wyoming and requested a jury trial. Although Gray’s criminal citation contained an error in the legal description of the location of the offense, the incident report of the citing officer contained the correct description and the State was allowed to amend its citation prior to the trial to conform to the correct description of the location of the offense from the incident report. The Wyoming District Court on appeal did not find this to be reversible error and on September 28, 2004, upheld the conviction. It appears clear from the court documents that no one, including the jury, was misled by the fact of the error in the citation of the description of the location of the offense in the criminal case, and Gray was convicted for Trespass to Hunt on the basis of a trespass at the corrected location. *See* exhibits 2 and 3.

10. As a result of the Wyoming conviction, Gray’s privileges to hunting, fishing, and trapping licenses in Wyoming were suspended from April 19, 2004, until December 31, 2005. Exhibit 1.

11. Gray offered the Department’s Wildlife Violator Compact Operations Manual (“Manual”) as evidence. However, the Manual predates the effective date of the Compact in North Dakota (August 2001) and is used by the Department only as a reference. Exhibit 7. The Administrator testified that the Department enforces the Compact in North Dakota in accordance with the statute. N.D.C.C. chapter 20.1-16.

CONCLUSIONS OF LAW

1. As a North Dakota licensed hunter, fisherman, or trapper, Gray is subject to the provisions of the Compact.

2. The evidence shows, by the greater weight of the evidence, that on April 19, 2004, Gray was convicted of the crime of Trespass to Hunt in Wyoming. This is a crime that is related to his activity at the time, in Wyoming, of hunting wildlife on private land without permission. As a result of the conviction, Gray's privileges to a license for hunting, fishing, and trapping in Wyoming were suspended from April 19, 2004, until December 31, 2005.

3. N.D.C.C. section 20.1-16-03 authorizes the Department to suspend Gray's privileges (licenses) to hunt, fish, and trap in North Dakota if it receives notice of a suspension of a person's hunting, fishing, or trapping privileges by a participating state and if the department determines that the violation leading to the suspension in the participating state could have led to the forfeiture of privileges under North Dakota's law. N.D.C.C. section 20.2-16-03(1). *See* N.D.C.C. section 20.1-16-05(3)(a).

4. A trespass for purposes of hunting in North Dakota could lead to a forfeiture of privileges under N.D.C.C. section 20.1-01-18. *See* N.D.C.C. section 20.1-01-26. It is not required that the land be posted in Wyoming for a conviction in Wyoming but both North Dakota and Wyoming law prohibit trespass for hunting and impose a criminal sanction for doing so. Although North Dakota requires the land to be posted and Wyoming does not, the evidence in this matter shows that the Wyoming private land was posted. Again, Gray could have had his license suspended in North Dakota for trespass on private land for hunting purposes. It is the Wyoming criminal statute that Gray violated, however, and the Department is authorized to uphold that conviction, under the Compact, by a corresponding suspension in North Dakota.

5. Wyoming suspended Gray's privileges until December 31, 2005. The Department is authorized to suspend for the same period of time that Wyoming suspended, but no more than a maximum of three years, in this case. N.D.C.C. section 20.1-16-03 (1); *see* N.D.C.C. section 20.1-01-26.

6. Essentially, all of Gray's legal arguments fail, they must under the Compact. The Department is authorized to act. Nevertheless, Gray argued at the hearing that he be granted “mercy” to allow him to hunt this year with his family members. He argued that the violation is not one of the priority or main violations that the public is to be protected against under the Compact. *See* exhibit 7, at 18-19. However, his Wyoming violation is a violation fitting within the purposes of the Compact (N.D.C.C. section 20.1-16-01) for the protection of wildlife in a Compact state and the Department is authorized to suspend North Dakota privileges in regard to it. At the close of the hearing, the Department made the same recommendation to the hearing officer that it stated in its October 12, 2004, letter to Gray, that all of Gray's North Dakota hunting, fishing, and trapping licenses be suspended until January 1, 2006.

7. Gray made a constitutional challenge to the Compact. However, the hearing officer must assume that the Compact is constitutional. The constitutionality of the statute must be challenged in the courts. *First Bank of Buffalo v. Conrad* 350 N.W. 2d 580 (N.D. 1984).

RECOMMENDED ORDER

The greater weight of the evidence shows that under the provisions of N.D.C.C. section 20.1-16-03, the Department is authorized to suspend the North Dakota hunting, fishing, and trapping licenses of David B. Gray for violations of the provisions of Wyoming law, W.S. section 23-3-305(b), Trespass to Hunt. The Department issued a determination to suspend Gray's licenses in its October 12, 2004, letter. The determination of that letter is **affirmed**.

Dated at Bismarck, North Dakota, this 2nd day of November, 2004.

State of North Dakota
Game and Fish Department

By: _____
Allen C. Hoberg
Administrative Law Judge
Office of Administrative Hearings
1707 North 9th Street
Bismarck, ND 58501
Telephone: (701) 328-3260